

Kanching Realty Sdn Bhd v Usahasama Proton-DRB Sdn Bhd A

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3-22-820 OF 2000 B
HARMINDER SINGH JC
9 JUNE 2009

Contract — Breach of contract — Lease — Claim for unpaid rental — Intention of parties — Whether valid and binding lease agreement reached C

Sometime in mid 1999, the plaintiff, the owner of a certain land in Gombak, had through its agent, Baypoint Corporation Sdn Bhd ('Baypoint'), entered into negotiations with the defendant, the distributor of Proton cars in Malaysia, for the rental of part of its property for use as an open-air car stockyard ('the premises'). During the negotiations, SP1, the director of the plaintiff, who was also the director of Baypoint, dealt with one Abbas Mehad, the chief executive officer of the defendant at that time. The evidence disclosed that SP1 had first given Abbas Mehad a letter, exh P11, upon which Abbas Mehad wrote 'Agreed subject to contract'. However, SP1 rejected exh P11 and asked Abbas Mehad to sign another letter. This time Abbas Mehad signed the letter, exh P12, and wrote 'Agreed' on the letter without any conditions. The exhs P11 and P12 were both dated 4 September 1999. The plaintiff had carried out part performance of the agreement, exh P12, by completing the preparatory works as set out in cl 1, 2 and 3 and handed over vacant possession to the defendant on 11 November 1999. It was accepted by the defendant by the enjoyment of the possession. However, on 11 November 2000, the defendant purported to terminate the agreement and left the premises on 22 December 2000. The plaintiff therefore claimed against the defendant for the unpaid rentals, double rental, rental for the balance period under the lease agreement as well as the expenditure incurred in preparing the property for the use of the defendant. The defendant however, contended that exh P12 was not a valid and binding lease agreement. The central issue was whether exh P12 was a valid and binding lease agreement between the parties for the said premises and if so, whether there was a breach of the same. D
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Held, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim with costs: I

- (1) The parties had intended to be bound by exh P12 but at the same time

- A proposed to have the terms restated in the lease agreement which were fuller or more precise but not different in effect. Exhibit P12 set out clearly and unequivocally all the necessary terms and conditions of a lease agreement. All the vital terms such as rental period, rental amount, and much more were already stated in exh P12 (see para 12 & 12(1)).
- B (2) The fact that Abbas Mehad agreed that the words 'subject to contract' be deleted is quite telling. This was a clear indication that the defendant intended to be bound by exh P12 (see para 12(2)).
- C (3) Further, the plaintiff had carried out part performance of the agreement by completing the preparatory works as set out in cll 1, 2 and 3 and handed over vacant possession to the defendant on 11 November 1999. The defendant had subsequently used the premises to keep their cars for a not insubstantial period of one year before they purported to terminate the agreement. The defendant had also proceeded to instruct a firm of architects and contractors, Kumpulan Arkitek, to erect temporary structures on the premises. They had obtained approval of the building plans for this purpose from the relevant authorities (see para 12(4) & (5)).
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- E (4) Considering the aforesaid circumstances, any reasonable person would conclude that the parties had intended to be bound by exh P12. For all intents and purposes, exh P12 was therefore as good as a concluded agreement. It was therefore valid and binding on the parties (see para 13).

F **[Bahasa Malaysia summary]**

- G Sekitar pertengahan 1999, plaintiff, pemilik tanah di Gombak, melalui ejennya, Baypoint Corporation Sdn Bhd ('Baypoint'), telah berunding dengan defendan, pengedar kereta Proton di Malaysia, untuk menyewakan sebahagian daripada hartanahnya untuk digunakan sebagai tempat simpanan kereta terbuka ('premis'). Semasa rundingan tersebut, SP1, pengarah plaintiff, yang juga merupakan pengarah Baypoint, berurusan dengan Abbas Mehad, ketua pegawai eksekutif defendan pada masa itu. Keterangan mendedahkan
- H bahawa SP1 pada mulanya memberikan sepucuk surat kepada Abbas Mehad, eksh P11, yang mana Abbas Mehad menulis 'Agreed subject to contract'. Walau bagaimanapun, SP1 menolak eksh P11 dan meminta Abbas Mehad untuk menandatangani surat yang lain. Kali ini Abbas Mehad menandatangani surat eksh P12, dan menulis 'Agreed' pada surat tersebut
- I tanpa sebarang syarat. Ekshibit P11 dan P12 kedua-duanya bertarikh 4 September 1999. Plaintiff telah melaksanakan sebahagian daripada perjanjian, eksh P12, dengan menyiapkan kerja-kerja persediaan sepertimana yang dinyatakan dalam klausa 1, 2 dan 3 dan menyerahkan milikan kosong kepada defendan pada 11 November 1999. Defendan menerima dan menikmati

milikan tersebut. Walau bagaimanapun, pada 11 November 2000, defendan berniat untuk menamatkan perjanjian dan meninggalkan premis pada 22 Disember 2000. Oleh itu plaintif menuntut terhadap defendan untuk sewa yang tidak dibayar, sewa berganda, sewa bagi tempoh baki dalam perjanjian pajakan begitu juga dengan perbelanjaan dalam menyediakan harta tersebut bagi kegunaan defendan. Defendan bagaimanapun, menghujah bahawa eksh P12 bukanlah perjanjian pajakan yang sah dan mengikat. Isu utama ialah sama ada eksh 12 merupakan perjanjian sah dan mengikat antara pihak-pihak untuk premis tersebut dan sekiranya benar, sama ada terdapat pelanggaran perjanjian tersebut.

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Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan dengan kos:

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- (1) Pihak-pihak tersebut berniat untuk diikat oleh eksh P12 tetapi pada masa yang sama dikatakan mempunyai terma-terma yang lebih lengkap dan tepat tetapi mempunyai kesan yang tidak jauh berbeza. Ekshibit P12 menyatakan dengan jelas segala terma-terma dan syarat-syarat penting perjanjian pajakan. Kesemua terma penting seperti tempoh sewaan, jumlah sewaan dan lain-lain lagi telah dinyatakan dalam eksh P12 (lihat perenggan 12 & 12(1)).

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- (2) Fakta bahawa Abbas Mehad bersetuju bahawa perkataan 'subject to contract' dipotong agak meyakinkan. Ini secara jelasnya menunjukkan bahawa defendan berniat untuk terikat dengan eksh 12 (lihat perenggan 12(2)).

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- (3) Selanjutnya, plaintif telah menyempurnakan sebahagian daripada perjanjian tersebut dengan menyiapkan kerja-kerja persediaan sepertimana yang dinyatakan dalam klausa 1, 2 dan 3 dan menyerahkan milikan kosong kepada defendan pada 11 November 1999. Defendan kemudiannya menggunakan premis tersebut untuk menyimpan kereta bagi tempoh tidak sampai setahun sebelum mereka berniat menamatkan perjanjian tersebut. Defendan juga terus mengarahkan firma arkitek dan kontraktor, Kumpulan Arkitek, untuk membina struktur sementara pada premis tersebut. Mereka telah mendapat kebenaran pelan bangunan bagi tujuan ini daripada pihak berkuasa yang berkenaan (lihat perenggan 12(4) & (5)).

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- (4) Dengan mempertimbangkan keadaan tersebut, mana-mana orang yang munasabah akan menyimpulkan bahawa pihak-pihak tersebut berniat untuk diikat oleh eksh P12. Bagi semua niat tujuan, eksh P12 oleh itu sama seperti perjanjian yang telah dimeterai. Maka perjanjian tersebut adalah sah dan mengikat pihak-pihak (lihat perenggan 13).]

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A Notes

For cases on breach of contract in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2516–2749.

Cases referred to

- B** *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor Appeal [1981] 1 MLJ 56, PC (refd)
- C** *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39, FC (refd)
Masters v Cameron (1954) 91 CLR 353, HC (refd)
Von Hatzfeldt-Wildenburg v Alexander [1912] 1 Ch 284, Ch D (refd)
- Barry Goh Meng Yew (Iza Ng Yeoh & Kit) for the plaintiff.*
- D** *Thomas KJ Lai (Sidek Teoh Wong & Dennis) for the defendant.*

Harminder Singh JC:

- E** [1] The plaintiff was the owner of the lands held under Geran 39593, Lot 57052 and Geran 39595, Lot 57054, Mukim Batu, Daerah Gombak, Selangor Darul Ehsan ('the property'). The defendant was a major distributor of Proton cars in Malaysia. Sometime in mid 1999, the plaintiff through its agent, Baypoint Corporation Sdn Bhd ('Baypoint') entered into negotiations
- F** with the defendant for the rental of part of the property measuring approximately 15 acres for use as an open-air car stockyard ('the premises'). The plaintiff contends there was a binding lease agreement through a letter dated 4 September 1999 from Baypoint to the defendant who accepted to be bound by the same. Vacant possession was handed over on 11 November
- G** 1999. However, on 11 November 2000, the defendant purported to terminate the agreement and left the premises on 22 December 2000.

- [2] The plaintiff is now claiming for unpaid rentals, double rental, rental for the balance period under the lease agreement as well as expenditure incurred in preparing the property for the use of the defendant. The
- H** defendant is contending that there was no valid and binding lease agreement.

- [3] The central issue therefore is whether there was a valid and binding lease agreement between the plaintiff and the defendant for the said premises.
- I** If so, was there a breach of the same? However, before this issue can be considered, there is one matter that needs to be decided first. During negotiations, the director of the plaintiff ('SP1') who was also the director of Baypoint dealt with one Abbas Mehad who was the chief executive officer ('CEO') of the defendant at that time. Two letters dated 4 September 1999

were signed by Abbas Mehad confirming an agreement to lease the said premises. These were marked as exhs P11 and P12. The question that arises is which of the letters constituted the final agreed document?

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[4] The evidence disclosed that SP1 had first given Abbas Mehad exh P11 is upon which Abbas Mehad wrote 'Agreed subject to contract'. However SP1 rejected exh P11 and asked Abbas Mehad to sign another letter. This time Abbas Mehad only wrote 'Agreed' and signed the letter without any conditions. This was exh P12. This was signed in front of SP1. This evidence remained uncontradicted. Abbas Mehad was not called to give evidence by the defendant and no explanation was provided for the failure to do so. So what was left was merely a feeble attempt to challenge the testimony of SP1 in this regard. In the end, I was more than satisfied that the testimony of SP1 in relation to the two letters was the true account of what transpired between him and Abbas Mehad. It was therefore quite clear that it was exh P12 which was the final document agreed by the parties.

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[5] Coming back to the central issue, was exh P12 then a valid and binding lease agreement? This question arises because exh P12 contained 13 clauses of which cl 12 stated that other standard terms and conditions of tenancy are to be included. SP1 of the plaintiff says that the usual terms are such as time is of the essence, the address for service of notices and other standard terms that are usually a part of every tenancy agreement.

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[6] The defendant is suggesting that because of this clause, there was therefore uncertainty and hence no concluded contract and in any event there was no acceptance by the defendant as there were many rounds of negotiations on several terms of the draft lease annexure that followed after exh P12.

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[7] On this question of when a contract is concluded, there already exists significant legal literature and the law is fairly settled. I would only need to refer to a few decisions. The Federal Court in *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39 approved a passage from the judgment of Parker J in *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at p 288 which reads as follows:

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It appears to be well-settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a

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A contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

B [8] In a similar vein, the Federal Court in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133 held:

C It is a matter of construction whether the execution of the further contract is a condition or term of the bargain, in which case there is no enforceable contract as the law does not recognise a contract to enter into a contract, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through, in which case there is a binding contract and reference to the more formal agreement can be ignored. In this respect, the court, in its task to ascertain the intention of the parties will, generally speaking, apply an objective test. In other words, it will ask itself what would the intention of reasonable men be if they were in the shoes of the parties of the alleged contract.

D [9] The Federal Court had occasion again to deal with this question in the case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327. The Federal Court cited with approval a passage in the Australian case of *Masters v Cameron* (1954) 91 CLR 353 which reads as follows:

F Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form, which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

G In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document come into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

H [10] The essence of these decisions is that each case is to be determined on its facts. The test is whether on the facts the parties intended that they are presently bound to each other or whether they intended there to be no

binding agreement until some condition is fulfilled ie the signing of a formal contract (see *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor Appeal* [1981] 1 MLJ 56 (PC)).

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[11] The rationale for this approach is more obvious than it seems. It was perhaps best stated by Gopal Sri Ram JCA (as he then was) when speaking for the Federal Court In *Charles Grenier Sdn Bhd v Lau Wing Hong*, he stated thus (at p 335):

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Unless the approach we have stated is adopted, a party to a contract who — after having concluded his bargain — entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which is disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.

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[12] In the instant case, it would appear from the facts and the evidence that the parties had intended themselves to be bound by exh P12 but at the same time proposed to have the terms restated in the lease agreement which were fuller or more precise but not different in effect. I have arrived at this conclusion for the following reasons:

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- (1) Exhibit P12 itself sets out clearly and unequivocally all the necessary terms and conditions of a lease agreement. All the vital terms such as rental period, rental amount, and much more were already stated in exh P12. In fact, exh P12 was fairly comprehensive in itself as it contained 13 clauses.
- (2) The fact that Abbas Mehad, the CEO of the defendant at the time, agreed that the words 'subject to contract' be deleted is quite telling. This was, to my mind, a clear indication that the defendant intended to be bound by exh P12.
- (3) Apart from cl 12 of exh P12, there is no mention at all for the need to have a formal binding lease annexure before an agreement is finalised.
- (4) The plaintiff had carried out part performance of the agreement is exh P12 by completing the preparatory works as set out in cll 1, 2 and 3 and handed over vacant possession to the defendant on 11 November 1999. Significantly, the defendant accepted that performance by enjoying possession until 22 December 2000.

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- A (5) The defendant had also proceeded to instruct a firm of architects and contractors, Kumpulan Arkitek, to erect temporary structures on the premises. They managed to obtain approval of the building plans for this purpose from the relevant authorities.
- B (6) The defendants had subsequently used the premises to keep their cars for a not insubstantial period of one year before they purported to terminate the agreement.
- C [13] Considering all these circumstances, I think any reasonable person would conclude that the parties had intended to be bound by exh P12 notwithstanding cl 12. For all intents and purposes, exh P12 was therefore as good as a concluded agreement. It was therefore valid and binding on the parties.
- D [14] Therefore, when the defendants through their solicitor's letter dated 11 November 2000 sought to terminate the lease agreement and leave the premises, which they did on 22 December 2000, they were in breach of this is agreement.
- E [15] In the result, I hold that the defendant was in breach of the agreement in exh P12 and was therefore liable for damages for such breach. Damages will be assessed by the senior assistant registrar. The plaintiff is entitled to costs. There was also a counterclaim by the defendant for damages which was contingent upon the court accepting that the repudiation of the lease agreement was by the plaintiff. In view of my decision on liability, the defendant's counterclaim is dismissed with costs.
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Plaintiff's claim allowed with costs. Defendant's counterclaim dismissed with costs.

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Reported by Ashgar Ali Ali Mohamed

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